92-884

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

MONICA L. MOORE,

Petitioner,

vs.

GWINNETT COUNTY; J. O. MEADOWS; XYZ COMPANY; and JOHN DOE, jointly and severally,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether qualified immunity is available as a defense under 42 U.S.C. Section 1983 to claims that an officer has used excessive force in violation of the Fourth Amendment's prohibition against unreasonable seizures.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Monica L. Moore, respectfully prays that the Supreme Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled case on August 6, 1992. In that decision, a panel of the Eleventh Circuit

reversed the United States District Court for the Northern District of Georgia and held that the police officer was entitled to Summary Judgment on the basis of qualified immunity.

Opinions Below

The memorandum opinion and order of the United States District Court for the Northern District of Georgia dated May 10, 1991 is not officially reported & appears as Appendix A ("App. A") hereto. The decision of the United States Court of Appeals for the Eleventh Circuit dated August 6, 1992 which reversed the decision of the District Court, is officially reported at 967 F.2d 1495 (11th Cir. 1992) and appears as Appendix B ("App. B") hereto.

Jurisdiction

The judgment of the panel of the Eleventh Circuit Court of Appeals was entered on August 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

The provision of the United States Constitution involved in this case is the Fourth Amendment as made applicable to the states through the Fourteenth Amendment. The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers, & effects, against unreasonable searches & seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

42 U.S.C. Section 1983 provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. Section 1983.

STATEMENT OF THE CASE

On August 5, 1988, Monica Moore went to visit her husband at his place of work, Trip'e D. Tooling. When Mrs. Moore arrived at Hurricane Shoals Road, one lane of traffic had been blocked with a barricade. Officer Meadows was stationed at the road barricade and was detouring traffic away from the Gwinnett County Airport. Mrs. Moore stopped at the barricade and attempted to advise Officer Meadows as to why she needed to proceed on Hurricane Shoals Road. After Officer Meadows made a hand motion to Mrs. Moore which she perceived as an indication that she could continue, she proceeded around the barricade to her husband's place of employment. Mrs. Moore had previously gone around two other roadblocks that day during visits to her husband's place of business.

Officer Meadows followed Mrs. Moore in his patrol car. Triple D. Tooling is located approximately 1 mile from the location of the

road block at the end of Hurricane Shoals Road which is a dead-end street. Additionally, the building and area into which Mrs. Moore drove her car is enclosed with a fence. When Mrs. Moore pulled into her husband's business both individuals exited their respective vehicles. Mrs. Moore's car was blocked by Officer Meadows' patrol car. Mrs. Moore immediately went inside to get her father-in-law to advise the policeman that she indeed had business on Hurricane Shoals Road. Upon Mrs. Moore's return to where the Officer was waiting, Officer Meadows demanded to see Mrs. Moore's driver's license and advised her that he was going to write her a ticket for running a roadblock. Officer Meadows appeared very upset, angry, and out-of-control, and he threatened to arrest her and take her to jail.

While Mrs. Moore's father-in-law and husband, Keith, were talking to Officer Meadows and attempting to settle him down, she went to her car, turned the engine off, and

got her purse out of the car. Mrs. Moore never attempted to get in her car and leave the scene of the incident. As she was walking past Officer Meadows, he violently grabbed her left wrist with one arm and her abdomen with his other arm. Mrs. Moore's father-in-law grabbed the officer's arm that was around her abdomen and attempted to pull Meadows away from her. After Mrs. Moore pivoted away from Officer Meadows, he grabbed Mrs. Moore's purse and attempted to yank it away from her. The purse strap broke, and Mrs. Moore fearfully ran into the building. Officer Meadows attempted to follow Mrs. Moore into the building; however, her husband stepped in front of Officer Meadows and advised him that he did not need to pursue her into the building, as she was eight months pregnant.

After speaking with Officer Meadows, Mrs. Moore's husband returned to the building and requested that she give her driver's license to the officer. Mrs. Moore attempted to

locate her license, but was unable to find it. She provided the officer with her name, and he radioed in the information. Officer Meadows advised Mrs. Moore that her license was suspended. Once again, Officer Meadows stated that he was going to arrest her and take her to jail. Mrs. Moore's husband drove her to the Gwinnett County Jail in their personal car. Mrs. Moore was booked, processed, and detained at the Gwinnett County Jail for approximately three hours. Additionally, she was required to post bail in the amount of $200.00 before being released.

In connection with her arrest, traffic citations were issued against Mrs. Moore for failure to obey a traffic control devise and driving with a suspended license. On December 11, 1989, the State Court of Gwinnett County issued an order of nolle prosequi on the basis that there was not sufficient evidence to prove guilt beyond a reasonable doubt. Additionally Mrs. Moore contacted Hall County

Recorder's Court regarding the suspension of her license and was advised that her license had not been revoked.

On August 7, 1988, two days after the incident, Mrs. Moore developed severe headaches, high blood pressure, a bloody discharge, and her unborn baby became very inactive. The following day, August 8, 1988, Mrs. Moore made an emergency visit to her treating obstetrician/gynecologist, Dr. Khalad S. Goheer, M.D. She was advised that the baby's heart was beating and that she was apparently suffering from stress. Mrs. Moore was advised to return to the physician's office for her regularly scheduled visit in approximately 5 to 7 days. Prior to her regularly scheduled visit, the baby terminated any movement.

During her visit with Dr. Goheer, approximately a week after the incident, Mrs. Moore was advised that the baby had died in utero. An ultrasound revealed that the skull

had already crossed and the bones of the baby had begun to soften, indicating that the baby had been dead for several days. Dr. Goheer advised Mrs. Moore to terminate the pregnancy as soon as possible. Approximately 3 days later, the fetus was stillborn. Mrs. Moore observed that the baby appeared to have been injured. The baby's entire upper body was purple, and there was blood coming out of his nose. On August 2, 1990, Monica Moore filed a complaint pursuant to 42 U.S.C. Section 1983 in the United States District Court for the Northern District of Georgia contending that her unlawful arrest by Officer Meadows violated her Fourth Amendment rights to be secure from unreasonable searches and seizures, as well as a claim for personal injuries, including the loss of her baby, suffered as a result of Meadow's unlawful acts.

Officer Meadows moved for summary judgment on the basis of qualified immunity.

By order and opinion dated May 10, 1991, Judge Hall denied Officer Meadows' Motion for Summary Judgment, App. A., and an appeal followed. In a decision dated August 6, 1992, the Eleventh Circuit Court of Appeals reversed the judgment of the District Court. The Court of Appeals held that Officer Meadows was entitled to qualified immunity on both unlawful arrest and excessive force claims.

REASONS FOR GRANTING THE PETITION

The decision of the Eleventh Circuit Court of Appeals presents a question of far-reaching importance: whether qualified immunity is available as a defense under 42 U.S.C. Section 1983 to claims that an officer has used excessive force in violation of the Fourth Amendment's prohibition against unreasonable seizures. That is a recurring question as to which the federal courts of appeals and many district courts are sharply divided, and it warrants this Court's review. The Eleventh Circuit Court of Appeals'

conclusion that the defense of qualified immunity must be evaluated with reference to the four factor test used under the substantive due process approach conflicts not only with other federal circuit and district court decisions applying qualified immunity in excessive force cases, but also with this Court's decision in Graham v. Connor, 490 U.S. 386, (1989) which held that all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. The decision below cannot be squared with existing precedent.

I. The opinion below conflicts with the prior decision of this Court in Graham v. Connor.

In determining whether Officer Meadows is entitled to the defense of qualified immunity against Mrs. Moore's cause of action under

42 U.S.C. section 1983 for the use of excessive force, the Eleventh Circuit considered the following four factors: (1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically. Moore v. Gwinnett County, 967 F.2d 1495 (11th Cir. 1992). Finding that the amount of force used by the officer was "reasonable according to established standards", the Eleventh Circuit granted Officer Meadow's Motion for Summary Judgment on the basis of qualified immunity. The four part test in Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir. 1986), applied by the Court below is incompatible with a proper Fourth Amendment analysis. The Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances. Graham, 490 U.S. at 386. By applying the four standards set forth

in Leslie v. Ingram, the Eleventh Circuit majority has explicably ignored controlling precedent and has decided an important question of constitutional law under an erroneous view of the governing substantive law which is in conflict with a decision of this Honorable Court.

In Graham v. Connor, this Court held that "all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach". Graham, 490 U.S. at 388, 395. The Court went on to state that the "reasonableness" inquiry in an excessive force case is an objective one: The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or

motivation. Id. at 397.

Addressing initially the issue whether the "malicious and sadistic" inquiry is merely another way of describing conduct that is objectively unreasonable, Chief Justice Rehnquist, writing for the majority, declared that the Court of Appeals erred in analyzing an excessive force claim under the four - part Johnson v. Glick test. Id. The Chief Justice stated that the four - part test, which puts in issue the subjective motivations of the individual officer, is incompatible with a proper Fourth Amendment analysis and has no bearing on whether a particular seizure is "unreasonable". Id. The four - factor test set forth in Johnson v. Glick is identical to the four - factor test endorsed by the court below in the subject case. Moore, 967 F.2d at 1495.

This Court found in Graham v. Connor that in determining whether the force used to effect a particular seizure is "reasonable"

under the Fourth Amendment requires a careful balancing of "the nature & quality of the intrusion on the individual's Fourth Amendment interests. Graham, 490 U.S. at 396. In making this determination, the Court stated that the proper application of the test of reasonableness under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case and whether the totality of the circumstances justifies a particular type of seizure.

In deciding Graham v. Connor, the unmistakable thrust of this Court was to formulate a broad rule of constitutional law setting forth the objective reasonableness standard as the applicable test for determining when an excessive use of force claim under the Fourth Amendment gives rise to a Section 1983 cause of action. Although this Court expressly declined to address the proper application of the qualified immunity defense in excessive force cases that arise under the

Fourth Amendment, to impose a four-part substantive due process test only when the defense of qualified immunity has been raised would impose an unreasonable burden on innocent citizens claiming a Fourth Amendment violation. Additionally, such a stringent requirement would unduly erode an individual's protection against improper search and seizure by imposing a single generic standard to evaluate an officer's actions in Section 1983 claims without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.

In deciding Graham v. Connor, this Court fashioned a broad rule which should be applicable even when the defense of qualified immunity is raised to all claims of excessive force under the Fourth Amendment.

The failure of the Eleventh Circuit panel majority to follow the clear dictates of

Graham v. Connor has resulted in a decision in conflict with the controlling decision of this Court. Because of this conflict, this petition for writ of certiorari should be granted.

II. The Eleventh Circuit's decision has increased the existing conflict among the Circuit Courts of Appeals regarding whether police officers who use excessive force may assert the defense of qualified immunity in Fourth Amendment claims.

Despite the clarity of this Court's holding in Graham v. Connor that all claims that law enforcement officials have used excessive force are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, there has been a discrepancy in the application of this constitutional standard to the qualified immunity defense in excessive force cases that arise under the Fourth Amendment.

> "Some courts have stated that qualified immunity is not a defense to a Fourth Amendment claim alleging the unlawful use of force during an arrest because the law is clearly established that the use of

excessive force is unlawful. Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988); Fernandez v. Leonard, 784 F.2d 1209, 1217 (1st Cir. 1986); Vizbaras v. Prieber, 761 F.2d 1013, 1018-19 (4th Cir. 1985) cert. denied, 474 U.S. 1101 (1986); Clark v. Beville, 730 F.2d 739, 740 (11th Cir. 1984). Other courts, however, have stated that qualified immunity is a defense to Fourth Amendment claims alleging unnecessary force during an arrest because a police officer may reasonably, but mistakenly, believe that such force was necessary. Whitt v. Smith, 832 F.2d 451, 452-54 (7th Cir. 1987); White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986); Acoff v. Abston, 762 F.2d 1543, 1548-50 (11th Cir. 1985); Varela v. Jones, 746 F.2d 1413, 1418 (10th Cir. 1984); Bauer v. Norris, 713 F. 2d 408, 411 (8th Cir. 1983), Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1347 (2d Cir. 1972). Some courts have stated that qualified immunity is a defense to a Fourth Amendment excessive force claim when a police officer reasonably relies on a statute or a judicial decision that authorizes the use of force. Washington v. Starke, 855 F.2d 346, 348 (6th Cir. 1988); Klein v. Ryan, 847 F. 2d 368, 371-75 (7th Cir. 1988); Garner v. Memphis Police Department, 710 F.2d 240, 242 (6th Cir. 1983), aff'd Tennessee v. Garner, 471 U.S. 1 (1985); Landrum v. Moats, 576 F.2d 1320, 1327 n.14 (8th Cir. 1978) cert. denied 439 U.S. 912 (1978). Other courts have merely stated that qualified immunity may be a defense. Heath v. Henning, 854 F.2d 6, 9 (2d Cir. 1988); Martin v. Gentile, 849 F.2d 863, 869 n.7 (4th Cir. 1988); Fiacco v. City of Rensselaer, 783 F.2d 319, 323 (2d Cir. 1986), cert. denied, 480 U.S. 922 (1987); Coon v. Ledbetter, 780 F.2d 1158, 1164 n.2

(5th Cir. 1986)."

Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officers Use of Excessive Force, 62 Temp.L.Rev. 61, 63 (1989).

Because qualified immunity was not raised as a defense, this Court in Graham v. Connor, expressly declined to address whether qualified immunity is available as a defense to claims of excessive force in violation of the Fourth Amendment.

The Eleventh Circuit has been inconsistent in its application of the qualified immunity defense. In Hamm v. Powell, 893 F.2d 293 (11th Cir. 1990), the Eleventh Circuit Court of Appeals held that qualified immunity was available as a defense to monetary liability for an objectively unreasonable use of force under the Fourth Amendment. However, in Ortega v. Sehramm, 922 F.2d 684 (11th Cir. 1991), the Eleventh Circuit held that a reasonable jury could have

found excessive force in violation of the plaintiff's Fourth Amendment rights. The Court in Ortega did not engage in a separate analysis of whether the officer was entitled to qualified immunity notwithstanding the use of undue force. Therefore, by implication, the Eleventh Circuit held that qualified immunity was not available in excessive force situations. Adams v. Lindsey, 759 F.Supp. 795 (S.D.Fla. 1991).

In determining whether qualified immunity was available as a defense, the majority opinion below applied a substantive due process analysis. While the Eleventh Circuit states that entitlement to qualified immunity depends on whether an officer's actions are "objectively unreasonable", the majority endorsed the four - factor test under the substantive due process approach as generally applicable to all claims of qualified immunity in excessive force cases that arise under the Fourth Amendment. Moore, 967 F.2d at 1495.

The contention that the assessment of an officer's qualified immunity defense and the constitutionality of his entire course of conduct should be evaluated under the four - factor substantive due process approach has been expressly rejected by the United States Court of Appeals for the Tenth Circuit.

In Dixon v. Richer, 922 F.2d 1056 (10th Cir. 1991) the Tenth Circuit held that in excessive force claims, asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry. Viewed in this perspective, the Court declared that Graham v. Connor directed lower courts to apply the Fourth Amendment standards to assess qualified immunity defenses raised against excessive force claims. The Court further stated that the relevant inquiry was the objective reasonableness standard set forth in Graham v. Connor. Id.

In short, this Court's decision in

Graham v. Connor did not end the debate over whether police officers who use excessive force may assert the defense of qualified immunity in Fourth Amendment claims. Because of the on-going conflict among the various circuits over the application of the Graham v. Connor decision to the defense of qualified immunity, this Court should grant the Petitioner's prayer for a writ of certiorari to finally resolve this conflict.

III. This Case presents an important federal question and is worthy of the Court's attention.

Petitioner respectfully contends that this case presents an important question of Federal law which should be resolved by this Court. The continuing controversy concerning the question presented herein is illustrated by the numerous conflicting circuit opinions concerning the application of qualified immunity as a defense to claims in excessive force cases that arise under the Fourth Amendment.

In the case at bar, the Eleventh Circuit applied the four - factor test used under the substantive due process approach, the Fifth Circuit created and applied a three - factor test and the Fourth, Sixth, and Seventh Circuits applied an "objective reasonableness" inquiry into the officers' actions.

More significantly, however, this Court in Graham v. Connor expressly declined to address whether qualified immunity is available as a defense to claims that an officer has used excessive force in violation of the Fourth Amendment's prohibition against unreasonable seizures as no claim of qualified immunity was raised in that case. Therefore, the Circuit Courts of Appeals have been deciding this important question of federal law which has not been, but should be settled by this Court.

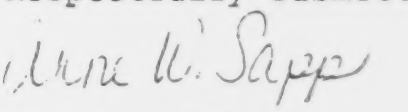
In view of the far-reaching and significant impact that the resolution of the important constitutional question raised by

this case will have on the availability and application of qualified immunity as a defense to Fourth Amendment claims of excessive force, the Petitioner's prayer for the issuance of a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,



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November 3, 1992

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MONICA L. MOORE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:90-CV-1706-RHH
	)	
GWINNETT COUNTY; J. O. MEADOWS; XYZ COMPANY; and JOHN DOE, jointly and severally,	)	
	)	
Defendants.	)	

ORDER

This is a case in which Plaintiff asserts claims against Defendants under 42 U.S.C. Section 1983, as well as various provisions of Georgia law. Jurisdiction is vested with this Court pursuant to 28 U.S.C. Section 1331. The case is before this Court on Defendants' Motion for Summary Judgment. The Court GRANTS IN PART and DENIES IN PART Defendants' Motion.

BACKGROUND

Plaintiff Monica L. Moore ("Plaintiff") is an individual resident of the State of Georgia. Defendant Gwinnett County ("Gwinnett") is a political subdivision of the State of Georgia. Defendant J. O. Meadows ("Meadows") is a policeman employed by Gwinnett. At all relevant times, Meadows was also employed by Defendant XYZ Company, the name and identity of which was unknown to Plaintiff at the time of the filing of her Complaint. Defendant John Doe, whose name and identity was also unknown to Plaintiff at the time of the filing of her Complaint, is an employee of the Gwinnett County Police Department who assisted Meadows in Plaintiff's arrest and booking.[1]

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[1]At the drafting of this Order, Plaintiff still has not specifically identified Defendants XYZ and John Doe. Therefore, Defendants' Motion for Summary Judgment will be considered only as regards Defendants Gwinnett and Meadows. As a result, regardless of the disposition of this Motion, all of

Plaintiff's and Defendants' versions of the facts giving rise to this lawsuit vary considerably. However, for the purposes of considering a motion for summary judgment, the Court takes as true the version proffered by the nonmovant, here the Plaintiff. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). Accordingly, below is a recitation of Plaintiff's version of the events giving rise to this lawsuit.

On August 5, 1988, Meadows was working traffic control on Hurricane Shoals Road ("the road") near the Gwinnett County Airport in Lawrenceville, Georgia. Meadows, who was wearing a police uniform, was stationed at a road barricade blocking the road and was detouring traffic away from the airport.

Plaintiff was driving on Hurricane Shoals Road when she reached the road barricade where

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Plaintiff's claims will be deemed still asserted against XYZ and John Doe, when and if these parties are eventually identified.

Meadows was stationed. Plaintiff had twice before on that same day gone around the roadblock to her husband's and father-in-law's place of business. Upon reaching the roadblock on this third occasion, Plaintiff stopped at the roadblock and attempted to speak to Meadows by having him come to her car. After Meadows made a hand motion to Plaintiff, she proceeded around the roadblock to her husband's place of business.

Meadows pursued Plaintiff in his patrol car, until the two reached Plaintiff's husband's place of business, at which time they exited their respective vehicles. Plaintiff immediately went inside to get her father-in-law, so that he could explain to Meadows that Plaintiff indeed did have business on Hurricane Shoals Road. Upon Plaintiff's return to where Meadows was waiting, Meadows asked Plaintiff for her driver's license. However, Plaintiff failed to produce the license. According to

Plaintiff, Meadows at this time "appeared very upset, angry, and out-of-control, and he threatened to take her to jail." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 3.

While Plaintiff's husband and father-in-law were taking to Meadows, Plaintiff went to her car, turned the engine off, and got her purse out of the car. Next, according to Plaintiff, "[a]s she was walking past Officer Meadows, he violently grabbed her left wrist with one arm and her abdomen with his other arm." Id. Plaintiff's father-in-law grabbed Meadow's arm that was around her abdomen and pulled Meadows away from Plaintiff. "After Mrs. Moore pivoted away from Officer Meadows, he grabbed Mrs. Moore's purse and attempted to yank it away from her. The purse strap broke, and [Plaintiff] fled into the building. Id. Meadows next attempted to follow Plaintiff into the building, but was stopped by Plaintiff's Husband, who informed Meadows that

Plaintiff was eight months pregnant.

At some point during the above exchange, Meadows informed Plaintiff's husband that he needed to see Plaintiff's driver's license. When her husband told Plaintiff to give the license to Meadows, Plaintiff stated that she could not find the license. Upon Plaintiff's identifying herself to Meadows, Meadows radioed a license check on Plaintiff. That license check showed that Plaintiff's license was suspended. Meadows then informed Plaintiff and her husband that he would have to take her to jail.

Plaintiff's husband transported Plaintiff to the Gwinnett County Jail in a private vehicle so that Plaintiff would not have to ride in the patrol car. Upon her arrival at the jail, Plaintiff was booked and processed. She was held there until her husband posted bail, approximately three or four hours later. In connection with her arrest, the Gwinnett County Solicitor's Office brought an

accusation on traffic charges against Plaintiff. Specifically, Plaintiff was charged with the misdemeanors of failure to obey a traffic control device and driving with a suspended license. On December 11, 1989, the State Court of Gwinnett County issued an Order of nolle prosequi dismissing the charges against Plaintiff. In that Order, the court stated its findings that although there existed probable cause for the issuance of the warrant in Plaintiff's case, "there [did] not appear to be sufficient evidence to prove guilt beyond a reasonable doubt." State Court's Order of Nolle Prosequi, attached as Exhibit A to Defendants' Motion for Summary Judgment.

On August 8, 1988, some three days after her arrest, Plaintiff paid an emergency visit to her treating obstetrician/gynecologist, Dr. Khalad S. Goheer, M.D.[2] Plaintiff had visited

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[2]The evidence is contradictory with regard to the specific timing of these visits.

Dr. Goheer for checkups regularly during the course of her pregnancy. At the time of her emergency visit, Plaintiff complained of "severe headaches, high blood pressure, a bloody discharge, and the baby['s having become] very inactive". Affidavit of Monica L. Moore, attached as Exhibit "A" to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 3, paragraph 9. Upon detecting a regular fetal heartbeat, and recognizing such a discharge to be a normal occurrence at that late stage in pregnancy, Dr. Goheer concluded that there was nothing to be concerned about, and instructed Plaintiff to come in for her regularly scheduled visit the following week.

According to Plaintiff, she first visited Dr. Goheer on August 8, 1988, and subsequently visited Dr. Goheer for her regular examination approximately one week after her arrest. See Affidavit of Monica L. Moore, attached as Exhibit "A" to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 3, paragraph 9. However, Dr. Goheer testifies that Plaintiff's first visit to him following

Accordingly, Plaintiff visited Dr. Goheer again approximately a week later. During his examination, Dr. Goheer could detect no fetal heartbeat. An ultrasound subsequently performed by Dr. Goheer likewise detected no cardiac or fetal movement. Based upon these tests, Dr. Goheer concluded that Plaintiff's baby had died in utero. He thus advised her to terminate the pregnancy as soon as possible. Accordingly, on August 18, 1988, Dr. Goheer induced delivery of Plaintiff's baby, which was stillborn.

On August 2, 1990, Plaintiff commenced this action, alleging in her Complaint that

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her arrest occurred on August 11, 1988, with her second visit occurring on August 16, 1988. Other details of Plaintiff's and Dr. Goheer's testimony, regarding Plaintiff's claimed symptoms at the times of her visits, differ as well. See Affidavit of Khalad S. Goheer, attached as Exhibit "B" to Defendants' Motion for Summary Judgment, pp. 2-3, Paragraphs 5-7. Nevertheless, for the purposes of considering the instant Motion, the Court takes Plaintiff's recollected times as true.

her unlawful arrest by Defendants constituted a violation of her constitutional rights in further violation of 42 U.S.C. Section 1983.[3] Specifically, Plaintiff alleges that her arrest violated her constitutional rights not to be deprived of her liberty without due process of law, and to be secure from unlawful arrest. Plaintiff also alleges that Defendants are liable under Georgia law for false arrest, false imprisonment, malicious prosecution, assault and battery, injury to her peace, happiness, or feelings, and the intentional infliction of emotional distress. As regards all of these claims, Plaintiff apparently additionally asserts a claim for

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[3] 42 U.S.C. Section 1983 provides a plaintiff with a cause of action for civil liability resulting from the deprivation, under color of state law, "of any rights, privileges, or immunities secured by the Constitution ..." "By its terms, of course, the statute creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." Oklahoma City v. Tuttle, 471 U.S. 808, 816 (citing Baker v. McCollan, 443 U.S. 137, 140, 144 n.3 (1979)).

personal injuries, including the loss of her baby, suffered as a result of Defendants' unlawful acts. Presently, Defendants have moved for summary judgment on all of Plaintiff's claims.

DISCUSSION

As an initial matter, Plaintiff in her Brief in Opposition to Defendants' Motion for Summary Judgment contends that the Court should not even consider Defendants' Motion, since it was not filed within the time allotted by the Local Rules. Plaintiff bases her contention upon her own calculation of the allotted days and her resulting conclusion that Defendants were some four days late in filing their Motion.

Thus, in order to establish a claim under Section 1983, a plaintiff must show: (1) that he or she was deprived of a right secured by the Constitution and laws of the Untied States; (2) that deprivation of this right was under color of state law; and (3) that the defendant caused such deprivation. Parratt v. Taylor, 451, U.S. 527, 535 (1981).

However, the Court finds Plaintiff's calculation of days to be incorrect. Pursuant to Local Rule 225-1, "unless the Court has either shortened the time for discovery or has for cause shown extended the time for discovery," discovery shall be "completed within four months after the last answer to the complaint is filed or should have been filed". Since the last answer was filed on August 31, 1990, and the parties did not request any extensions of time, discovery in this case therefore ended on December 31, 1990. Local Rule 220-5(c) provides that "[m]otions for summary judgment shall be filed ... not later than 20 days after the close of discovery", making the filing deadline for Defendants' Motion January 20, 1991.

However, two "legal holidays", as that term is defined in the Federal Rules of Civil Procedure, fall within the first few weeks of January, which holidays affect the

computation. First, pursuant to Fed. R. Civ. P. 6(a) and Local Rule 202-1, New Year's Day (January 1) is excluded from the computation, making the filing deadline for Defendants' Motion January 21. However, January 21 itself is the day celebrating the Birthday of Martin Luther King, Jr., and therefore it as well is excluded from the computation. Therefore, instead of Defendants' Motion for Summary Judgment having to be filed by January 18, as Plaintiff contends, Defendants' Motion was in fact not due until January 22, the day upon which it was filed. Thus, the Court finds that Defendants were timely with regard to the filing of the Motion presently under consideration.

I. Standard of Review for Summary Judgment

This Court will grant summary judgment when "there is no genuine issue as to any material fact ... and the moving party is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(c). The moving party must demonstrate that the nonmoving party lacks evidence to support an essential element of her or his claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, 484 U.S. 1066 (1988). The movant's burden is "discharged by showing -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. Once the movant has met this burden, the opposing party must present evidence establishing a material issue of fact. Id. The nonmoving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324.

All evidence and factual inferences should be viewed in the light most favorable to the nonmoving party. Rollins, cited supra, 833 F.2d at 1529; Everett, cited supra, 833 F.2d at 1510. However, "the mere existence of some alleged factual dispute between the

parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). An issue is not genuine if it is unsupported by evidence or is created by evidence that is "merely colorable" or "not significantly probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248. Thus, to survive a motion for summary judgment, the nonmoving party must come forward with specific evidence of every element essential to his or her case so as to create a genuine issue for trial. Celotex, 477 U.S. at 323; Rollins, 833 F.2d at 1528.

II. Application

A. Plaintiff's Claims against Gwinnett County

(i) Plaintiff's Section 1983 Claims against Gwinnett County

Plaintiff claims that Meadows, acting under color of state law, violated her constitutional rights by depriving her of her liberty without due process of law and by depriving her of her right to be secure from unlawful arrest. As regards Gwinnett specifically, Plaintiff alleges that Gwinnett "knew of the violent nature and tendencies of the Defendant Meadows and is liable for placing Meadows in a position where his violent tendencies would be manifested." Complaint, paragraph 15. Finally, Plaintiff alleges that "Gwinnett improperly trained and supervised the Defendant Meadows," resulting in Plaintiff's injury. Id.

Although it is clear that a municipality, such as Gwinnett, cannot claim absolute immunity from suit under Section 1983, it

cannot be held liable under Section 1983 solely on a theory of respondent superior. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1978). Accordingly, a municipality cannot be held liable under Section 1983 absent a showing that the alleged deprivation of rights was the result of a custom, pattern or practice of the municipality. Id. at 690-91; Oklahoma City v. Tuttle, 471 U.S. 808, 810 (1985). Furthermore, a municipality may not be held liable under Section 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell, 436 U.S. at 691 (emphasis added).

Interpreting the Monell language, the Eleventh Circuit has held that, for a municipality to be held liable under Section 1983, it "must be at fault in some sense for establishing or maintaining the policy which causes the injurious result, although the policy in question may be an informal custom

which has not received formal approval but has attained the 'force of law'". Owens v. City of Atlanta, 780 F.2d 1564, 1567 (11th Cir. 1986) (citing Fundiller v. City of Cooper City, 777 F.2d 1436, 1442 (11th Cir. 1985)). While a "policy" or "custom" may be found to exist where a municipality fails to correct unconstitutional behavior of its police officers, Section 1983 liability will not lie unless the municipality either tacitly authorizes the behavior or displays deliberate indifference toward the police misconduct. Brooks v. Scheib, 813 F.2d 1191, 1193 (11th Cir. 1987) (citing Cannon v. Taylor, 782 F.2d 947, 951 (11th Cir. 1986)).

Applying the Monell standard of analysis to this case, the Court finds that Plaintiff has failed to show either that the alleged deprivation occurred as a result of any official policy promulgated by Gwinnett, or that Gwinnett engaged in a custom or practice of violating citizens' constitutional rights.

In fact, nowhere in Plaintiff's pleadings or affidavits does she mention any official policy of Gwinnett. Absent such a showing by Plaintiff, Gwinnett cannot be held liable solely on the grounds that one of its officers violated Plaintiff's constitutional rights.

Moreover, as regards Plaintiff's contention that Gwinnett was aware of Meadows' "violent nature", Defendants present evidence indicating that, in fact, Meadows has no history of having used excessive force during any previous arrest. See Defendants' Statement of Material Facts as to which There Remains No Genuine Issue to be Tried, p. 6, paragraph 21. Plaintiff fails to go "beyond the pleadings" and present any evidence whatsoever to the contrary. As in Brooks v. Scheib, cited supra, there is in this case "no evidence that would allow a jury to find that [Gwinnett] knew or should have known that the natural consequence of its policy and practice would be the deprivation of constitutional

rights." 813 F.2d at 1193 (citing Owens, 780 F.2d at 1568). In Brooks, the Eleventh Circuit granted the city's motion for summary judgment on this issue due to the fact that previous reports of excessive force being used by the individual officer defendant had been duly investigated by the city and found to be unreliable. In this case, where no evidence whatsoever has been presented indicating even the existence of any such previous reports, the same analysis is equally appropriate.

Rather than pointing to a specific Gwinnett County policy, Plaintiff bases her contentions of Gwinnett's liability solely upon the alleged acquiescence of Captain Cantrell, Meadows' commanding officer present at the roadblock, in Meadows' actions at the time of Plaintiff's arrest -- regardless of the fact that both parties' versions of the facts clearly establish that Captain Cantrell was not present at the scene of Plaintiff's arrest. Specifically, Plaintiff points to the

facts, first, that Captain Cantrell did not interfere with Meadows' pursuit of Plaintiff at the roadblock, and second, that upon Captain Cantrell's subsequently being informed by Plaintiff of the loss of her baby, he failed either to file an incident report or instigate an internal investigation into the events of August 5, 1988. However, the Court finds that Plaintiff has failed to indicate through such unsupported allegations either that Captain Cantrell "tacitly authorized" the violation of Plaintiff's constitutional rights, or was "deliberately indifferent" to Meadows' alleged misconduct.

Thus, the Court finds that Plaintiff has failed to produce any evidence indicating either the promulgation by Gwinnett of an official policy or custom resulting in the deprivation of Plaintiff's constitutional rights, Gwinnett's knowledge of any "violent tendencies" of Meadows', or Gwinnett's tacit authorization of, or deliberate indifference

toward, the alleged deprivation of Plaintiff's constitutional rights. As a result, the Court finds that Gwinnett is entitled to summary judgment as regards Plaintiff's Section 1983 Claims.

(ii) Plaintiff's State Law Claims against Gwinnett County

As an initial matter, Defendant Gwinnett County claims that it is entitled to summary judgment on all of Plaintiff's claims under state law on the grounds that Plaintiff failed to file a notice of claim against the county within twelve months following the incident giving rise to her claims. O.C.G.A. Section 36-11-1 provides: "All claims against counties must be presented within 12 months after they accrue or become payable or the same are barred ...." Nevertheless, Georgia courts have held that the state cannot impose such conditions upon the right of a plaintiff to proceed under 42 U.S.C. Section 1983.

Williams v. Posey, 475 F.Supp. 133, 134 (M.D. Ga. 1979) (Owens, J.). Defendants thus seek dismissal only of Plaintiff's state law claims on these grounds.

Plaintiff does not dispute the fact that she failed to file a notice of claim within twelve months of her arrest. Rather, she opposes Defendant's argument on the grounds that she commenced the present lawsuit against the county within twelve months of the nolle prosequi dismissal of the county's misdemeanor charges against her. Plaintiff argues that Section 36-11-1 mandates that such notice be provided within twelve months of the date upon which her claims against Gwinnett were "manifest to the point of maintaining a successful result." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 6. Plaintiff argues that her claims against Gwinnett reached this point only upon the county's dismissal of its misdemeanor charges against her on December

11, 1989. Plaintiff thus argues that since the present lawsuit was commenced within twelve months of that date, she has satisfied the requirements of O.C.G.A. Section 36-11-1.

The Court does not agree with Plaintiff. Plaintiff alleges that Defendants violated numerous provisions of Georgia law prohibiting false arrest, false imprisonment, malicious prosecution, assault and battery, injury to peace, feelings, or happiness, and the intentional infliction of emotional distress. Clearly, these claims "accrued", for the purposes of applying Section 36-11-1, on August 5, 1988. The fact that the county's misdemeanor charges against Plaintiff were later dismissed had no effect upon her pre-existing claims under federal and state law.[4]

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[4] "The validity of an arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." Michigan v. DeFillippo, 443 U.S. 31, 36 (1979).

This interpretation of Section 36-11-1 is further bolstered in this particular case by the fact that all of Plaintiff's claims in fact directly concern events which occurred on August 5, 1988. Therefore, the Court finds that Defendant Gwinnett County is entitled to summary judgment as regards Plaintiff's state law claims against that Defendant.

B. Plaintiff's Claims against Officer Meadows

Defendants move for summary judgment on Plaintiff's claims against Meadows on the grounds that Meadows is entitled to qualified immunity. "Public officials performing discretionary functions enjoy qualified or good faith immunity from civil damages liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.'" Herren v. Bowyer, 850 F.2d 1543, 1545 (11th Cir. 1988) (quoting Harlow v. Fitzerald, 457 U.S. 800, 818

(1982)). Thus, an official is entitled to summary judgment based on qualified immunity if "a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." Stewart v. Baldwin County Bd. of Education, 908 F.2d 1499, 1503 (11th Cir. 1990).

In evaluating summary judgment motions based on qualified immunity, courts in this circuit follow a two-step analysis. First, "the defendant public official must ... prove that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988) (quoting Ziegler v. Jackson, 716 F.2d 847 (11th Cir. 1983)). See also, Ansley v. Heinrich, No. 89-3468, slip op. at 2337, 2345 (11th Cir. 1991). Second, once the defendant makes this preliminary showing, the burden shifts to the

plaintiff, who must prove that the official's conduct violated clearly established constitutional law. Rich, 841 F.2d at 1564.

As the Rich court noted, however, the second step of this analysis itself contains two distinct prongs. Id. First, the plaintiff must show that "the legal norms allegedly violated by the defendants were clearly established at the time the defendants acted." Stewart, 908 F.2d at 1503. See also, Ansley, slip op. at 2345. The plaintiff cannot satisfy this burden by invoking a broad constitutional guaranty, such as the right to "due process of law." It is axiomatic that most all constitutional rights are "clearly established" at such a generalized level. Instead,

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing [i.e., the conduct alleged by the

> plaintiff] violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ... but it is to say that in the light of preexisting law the unlawfulness [of the alleged conduct] must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citations omitted). Second, if the plaintiff proves that the rights allegedly violated were "clearly established," he must then carry the burden he normally bears in opposing summary judgment outside the context of qualified immunity: he must show that a genuine issue of material fact exists "as to whether the defendant actually engaged in conduct that violated the clearly established rights." Herren, 850 F.2d at 1546. See also, Ansley, slip op. at 2345. Consequently, a plaintiff can defeat an officer's summary judgment motion based on qualified immunity only if he proves that the right allegedly violated was "clearly established" as a matter of law and that disputed issues of material

fact exist as to whether the alleged conduct actually occurred.

Once a plaintiff defeats an officer's summary judgment motion based on qualified immunity by demonstrating the existence of disputed issues of material fact, the defense may not subsequently be raised at trial. Ansley, slip op. at 2347. It is well established that "qualified immunity is a question of law for the court to decide preferably on pretrial motions" such as the one at issue here. Id. (citing Bennett v. Parker, 898 F.2d 1530, 1535 n.2 (11th Cir. 1990)). The court in Ansley continued:

> Qualified immunity is an affirmative defense from trial and not a defense to liability issues raised during trial. Accordingly, once the defense of qualified immunity has been denied pretrial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity.

Ansley, slip op. at 2347 (citing Mitchell v. Forsyth, 472 U.S. 511, 526).

(i) Plaintiff's Section 1983 Claims against Officer Meadows

Plaintiff alleges that her unlawful arrest by Meadows was in violation of her constitutional rights not be deprived of her liberty without due process of law, and to be secure from unlawful arrest. Specifically, Plaintiff claims, first, that Meadows used excessive force in the conduct of her arrest, resulting in Plaintiff's injury. Second, Plaintiff claims that she was arrested without probable cause. In response, Defendants contend, first, that Meadows' actions in restraining Plaintiff may not be construed as "excessive" in light of the surrounding circumstances. Defendants answer Plaintiff's second contention by maintaining that Meadows in fact did have probable cause to arrest Plaintiff.

As before, when considering a motion for summary judgment, the Court views all evidence and factual inferences in the light most

favorable to the nonmoving party. Rollins, 833 F.2d at 1529; Everett, 833 F.2d at 1510. Viewing all evidence and factual inferences in the light most favorable to Plaintiff, the Court finds that Plaintiff has satisfied her burden, and may therefore avoid summary judgment with regard to these claims.

First, regarding Plaintiff's excessive force claim, the law is clearly established that the Fourth Amendment guarantees the right to be free from the use of excessive force in the course of an arrest. Mullis v. State, 196 Ga. 569, 577-78 (1943) ("Even though an officer may have a legal right to make an arrest, still he can use no more force than is reasonably necessary under the circumstances, and cannot use unnecessary violence disproportionate to the resistance offered."). In Graham v. Connor, the Supreme Court determined that claims relating to excessive force in the course of an arrest are properly analyzed under the Fourth Amendment's

"objective reasonableness" standard. 109 S.Ct. 1865 (1989). Under this standard, the court must determine whether the officer's actions were "objectively reasonable" in light of the facts and circumstances confronting them and without regard to the officer's underlying intent or motivation. Id. The court must evaluate reasonableness from the perspective of the officer on the scene, not with the 20/20 vision of hindsight. Id.

This Court realizes that the evaluation of reasonableness in the context of an arrest "must embody an allowance for the fact that police officers are often forced to make split second decisions about the amount of force necessary in a particular situation." Id. Nevertheless, the Court finds that, taking Plaintiff's version of the facts as true, Meadows' actions clearly violated her right to be free from excessive force in an arrest.

According to Plaintiff, she was not attempting to flee, but rather was attempting

to locate her driver's license for Meadows when he grabbed her wrist, and placed his other are forcefully around her abdomen. In another situation, Meadows' conduct would likely be deemed not excessive at all. However, given Plaintiff's testimony that she was at the time eight months pregnant, and that this condition was obvious to the casual observer, restraining Plaintiff by grabbing her wrist and then grabbing her forcefully around the abdomen cannot be characterized as "objectively reasonable." To the contrary, the force allegedly employed by Meadows clearly extended beyond that necessary to effect the arrest of Plaintiff, given the circumstances of this case.

The Court further finds that, in satisfaction of the second prong of the qualified immunity analysis, Plaintiff has gone beyond the pleadings and presented evidence indicating the existence of a material issue of fact regarding whether

Meadows acted in such a way as to violate her clearly established right to be free from the use of excessive force in an arrest. Not only does her version of the occurrences of August 5, 1988 differ substantially from that proffered by Defendants, but she also submits in support of her own version the affidavits of her husband, her father-in-law, and another man, unrelated to Plaintiff, who was standing nearby at the time of Plaintiff's arrest. See Exhibits "B", "C" and "D" attached to Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment.

Thus, Meadows is not entitled to summary judgment on Plaintiff's Section 1983 claim of excessive force asserted against Meadows individually. At trial, the jury will have to weight the credibility of Plaintiff's account of the events of August 5, 1988 against the credibility of Defendants' account.

The Court also finds that Plaintiff may avoid summary judgment on her second claim

under Section 1983, that she was arrested without probable cause. It is well established that "[a]n individual's right to be free from unlawful arrest and imprisonment implicates a liberty interest indisputably protected by the Constitution and federal laws, the violation of which may give rise to cause of action under Section 1983." Motes v. Myers, 810 F.2d 1055, 1059 (11th Cir. 1987) (citing Monroe v. Pape, 365 U.S. 167 (1961); Duriso v. K-Mart, 559 F.2d 1274, 1277 (5th Cir. 1977)). The Court in Motes continued: "Under the Fourth Amendment, a person has the right not to be arrested unless probable cause justifies the arrest." Id. Thus, Plaintiff has satisfied the first prong of the qualified immunity analysis, requiring a showing that the right allegedly violated is "clearly established."

In arrest cases, the proper standard with which to analyze questions of probable cause is whether the arresting officer had "reason

to believe that [the suspect] had committed, was committing, or was about to commit [an] offense under state or federal law." Ybarra v. Illinois, 444 U.S. 85, 91 (1979). See also, Michigan v. DeFillippo, 443 U.S. 31, 36 (1979). Plaintiff was arrested on misdemeanor charges of failure to obey a traffic control device and driving with a suspended license. The question then is whether Meadows reasonably believed at the time of Plaintiff's arrest that she had committed those infractions.[5]

In this case, there are a number of discrepancies in the evidence presented regarding, first, whether Plaintiff attempted to inform -- or did inform -- Meadows of her

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[5]The State Court of Gwinnett County, in issuing its December 11, 1989 nolle prosequi Order, specifically stated its finding that "there appears to be sufficient probable cause for the issuance of a warrant ..." See Order attached as Exhibit "A" to Defendants' Motion for Summary Judgment. Regardless of this previous finding, Plaintiff in this case is

intent to proceed through the roadblock, and second, whether Meadows was aware that Plaintiff's driver's license was suspended when he first told Plaintiff that she was under arrest. In support of her testimony regarding these two issues, Plaintiff has presented her own affidavit and the affidavits of several other individuals. Plaintiff thus has gone beyond the pleadings and demonstrated the existence of a material issue of fact with regard to whether Meadows arrested her without

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not collaterally estopped from relitaging the issue of probable cause. Collateral estoppel is properly invoked to preclude adjudication of an issue previously litigated only "if the issue in the subsequent proceeding is identical to the one involved in the prior action, the issue was actually litigated, and the determination of the issue was necessary in the prior action." Williams v. Bennett, 689 F.2d 1370, 1381 (11th Cir. 1982, cert. denied, 464 U.S. 932 (1983) (emphasis added). In this case, in the absence of any evidence to the contrary, it may not be assumed that the question of probable cause in the issuance of a warrant for the arrest of an individual suspected of committing two misdemeanor traffic infractions was actually litigated before the State Court of Gwinnett County. As a result, collateral estoppel does not apply.

probable cause in violation of her Fourth Amendment rights. Thus, Meadows is not entitled to summary judgment on grounds of qualified immunity with regard to this claim.

(ii) Plaintiff's State Law Claims against Officer Meadows

Plaintiff asserts additional claims against Meadows under Georgia law. Specifically, Plaintiff asserts statutory claims against Meadows alleging false arrest in violation of O.C.G.A. Section 51-7-1, false imprisonment in violation of O.C.G.A. Section 51-7-20, and malicious prosecution in violation of O.C.G.A. Section 51-7-40. Defendants argue that they are entitled to summary judgment on these claims as well. However, pursuant to the express language of those statutory provisions, a determination of their applicability depends upon an evaluation of the existence of probable cause for the

officer's actions in question.[6] O.C.G.A. Section 51-7-3 specifically provides that "[l]ack of probable cause shall be a question for the jury, under the direction of the court." Georgia courts adhere to this rule "unless from the undisputed facts it is obvious to the court that probable cause does or does not exist." Medoc Corp. v. Keel, 166 Ga.App. 615, 616 (1983) (citing Harmon v. Redding, 135 Ga.App. 124 (1975)). This Court has already stated its finding of the existence of a genuine issue of material fact

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[6]O.C.G.A. Section 51-7-1 provides: "An arrest under process of law, without probable cause, when made maliciously, shall give a right of action to the party arrested." O.C.G.A. Section 51-7-20 provides: "False imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty." Finally, O.C.G.A. Section 51-7-40 provides: "A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action."

with regard to probable cause. See supra. Such factual disputes may not properly be resolved by this Court as a matter of law through summary judgment. Because the Court is unable to determine, in the context of a motion for summary judgment, whether probable cause existed for Plaintiff's arrest, imprisonment and prosecution, Meadows is not entitled to summary judgment on these claims.

Plaintiff also asserts a claim against Meadows for assault and battery pursuant to O.C.G.A. Section 51-1-13. That section provides: "A physical injury done to another shall give a right of action to the injured party, whatever may be the intention of the person causing the injury, unless he is justified under some rule of law." Georgia courts have held that where, as a result of the defendant's actions, a pregnant woman suffers injuries which a person who was not pregnant would not have suffered, she is nevertheless allowed to recover under this

section.[7] Due to conflicting evidence with regard to when Plaintiff in fact visited Dr. Goheer, what specific symptoms she complained of at the times of those visits, and the proximity in time of the loss of her baby to the events surrounding her arrest, the Court is unable to determine, from the evidence submitted thus far, whether and to what extent Plaintiff suffered injury due to Meadows' actions. Because this is therefore a proper question for the jury, the Court finds summary judgment on this claim to be inappropriate as well.

Plaintiff also asserts a claim pursuant to O.C.G.A. Section 51-12-6, alleging injury

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[7]Although not precisely on point as regards Plaintiff's claims for injuries which she sustained in the present case, it is also noteworthy that Georgia courts have held that this section gives a cause of action to a child born injured as a result of damage inflicted by another person at any period during the baby's prenatal life. See Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504 (1956).

to her peace, happiness, or feelings. However, the language of that provision clearly indicates that an action thereunder is appropriate only in circumstances "in which the entire injury is to the peace, happiness, or feelings of the plaintiff ...." (emphasis added). That section is not intended as an additional grounds for recovery for plaintiffs also asserting physical and other types of injury, as does Plaintiff in this case. See Pilkenton v. Eubanks, 139 Ga.App. 673 (1976). Therefore, the Court finds that Defendants are entitled to summary judgment as regards Plaintiff's claim for injury to her peace, happiness, or feelings.

Finally, Plaintiff also asserts a state law claim against Meadows alleging the intentional infliction of emotional distress. Georgia law recognizes the tort of intentional infliction of emotional distress. Pierson v. News Group Publications, Inc., 549 F.Supp. 635, 643 (1982) (citing Ga. Power Co. v.

Johnson, 155 Ga.App. 862 (1980)).

> To recover for emotional distress, it must be demonstrated that the defendant committed a "wanton, voluntary or intentional wrong the natural result of which is the causation of mental suffering..." Thus, actual intent on the part of the defendant to produce such distress is not essential to recovery. A reckless and willful disregard of the consequences of one's actions, coupled with knowledge of the probable results also forms a basis for recovery.

Pierson, 549 F.Supp. at 643 (citations omitted). The acts of the defendant must be "so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff." Ga. Power, 155 Ga.App. at 863.

Again taking Plaintiff's version of the facts as true, this Court cannot say as a matter of law that Meadows' actions were not "so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff." To the contrary, Plaintiff presents evidence, in the form of her own affidavit and the affidavits of her husband

and father-in-law, that she in fact was humiliated, embarrassed and frightened by Meadow's actions in restraining, arresting, booking and charging her. In moving for summary judgment, Defendants present no evidence to the contrary. In addition, this Court has already determined that if Plaintiff's version of the facts is indeed true, Meadows used clearly excessive force in restraining Plaintiff, which very well could have humiliated, embarrassed, and most of all, frightened, Plaintiff, who is according to the evidence submitted a small-framed woman who at the time was obviously eight months pregnant. Thus, the Court finds that a material issue of fact remains regarding whether Meadows intentionally inflicted emotional distress upon Plaintiff in violation of Georgia law. Meadows is therefore not entitled to summary judgment as regards this claim.

C. Plaintiff's Claims for the Loss of Her Baby

Requiring separate consideration under the summary judgment standard is Defendants' contention that they are entitled to summary judgment with regard to Plaintiff's allegations that the death of her unborn baby resulted from Meadows' use of excessive force during his arrest of Plaintiff. Defendants present as evidence the affidavit of Dr. Goheer. See affidavit, attached as Exhibit "B" to Defendants' Motion for Summary Judgment, pp. 3-4, paragraphs 10-11. Therein, Dr. Goheer testifies that upon his delivery of the baby on August 18, 1988, some thirteen days after Plaintiff's arrest, he "observed no sign of injury to the baby that could have been a clinical impression of fetal demise, nor did he observe any premature separation of the placenta to reflect any cause." Id. at p. 3, paragraph 10. Dr. Goheer further testifies that it was his observation that the

baby reflected "no apparent cause of fetal death." Id. at p. 4, paragraph 10. Dr. Goheer concludes the affidavit by stating, "I would construe that the baby's death was caused by reasons other than an injury to Mrs. Moore, which reasons are unknown to me. My impression has since been further substantiated by my review of the autopsy and pathology reports on Mrs. Moore's baby." Id. p. 4, paragraph 11.

In response to this showing by Defendants, Plaintiff points to the depositions of herself and her husband, wherein they testify, contrary to the testimony of Dr. Goheer, that upon the delivery of the baby, they observed that "the baby appeared to have been injured. The baby's entire upper body was purple and there was blood coming out of his nose." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, p. 5 (citing Monica Moore Deposition, p. 36, 58-59; James

Keith Moore Deposition, p. 37). Thus, the Court finds that Plaintiff has satisfied her burden of going beyond the pleadings and presenting evidence of the existence of a material fact with regard to whether Meadows' actions caused the death of Plaintiff's baby. Defendants therefore are not entitled to summary judgment with regard to this issue, which at the time of trial will go to the question of damages/injury.

CONCLUSION

The Court GRANTS IN PART and DENIES IN PART Defendants' Motion for Summary Judgment. Defendants' Motion is GRANTED IN PART as regards all of Plaintiff's federal and state law claims against Defendant Gwinnett County, as well as Plaintiff's state law claim for injury to peace, happiness, or feelings asserted against Defendant Meadows. Defendants' Motion is DENIED IN PART as regards Plaintiff's remaining claims asserted against Defendant Meadows under 42 U.S.C.

Section 1983 and various provisions of Georgia law. Defendants' Motion is also DENIED IN PART as regards the issue of Meadows' alleged causation of the death of Plaintiff's baby.

So ORDERED this _____ day of May, 1991.

ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

MONICA L. MOORE, Plaintiff-Appellee,

v.

GWINNETT COUNTY, and XYZ COMPANY, and JOHN DOE, jointly and severally, Defendants,

J. O. MEADOWS, Defendant-Appellant.

No. 91-8500.

United States Court of Appeals,
Eleventh Circuit.

Aug. 6, 1992.

Pregnant motorist who was arrested and restrained by police officer brought civil rights suit after her child was stillborn. The United States District Court for the Northern District of Georgia, No. 1:90-CV-1706-RHH, Robert H. Hall, denied police officer's motion for summary judgment on defense of qualified immunity and appeal was taken. The Court of Appeals, Birch, Circuit Judge, held that officer was entitled to qualified immunity on both unlawful arrest and excessive force claims.

Reversed and remanded.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and RONEY, Senior Circuit Judge.

BIRCH, Circuit Judge:

In this appeal we review the district court's denial of summary judgment sought by a defendant police officer on the basis of qualified immunity. Plaintiff-appellee Monica Moore sued defendant-appellant James O. Meadows under 42 U.S.C. Section 1983 (1988) and various state law theories based upon the facts surrounding her arrest for a traffic offense in August 1988. With respect to her action for damages under section 1983, the appellee claimed that she was arrested without probable cause and that Meadows used excessive force in the conduct of her arrest. Meadows, a police officer for Gwinnett County, Georgia,

moved for summary judgment on all claims, relying partly on the doctrine of qualified immunity as a shield against Moore's section 1983 theories. According to this doctrine, "public officials performing discretionary functions enjoy qualified or good faith immunity from civil damages liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person w ould have known.'" Herren v. Bowyer, 850 F.2d 1543, 1545 (11th Cir. 1988) (footnote omitted) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)).

The district court concluded that disputed issues of material fact defeated Officer Meadow's motion. In our review of that determination, we must view all evidence and factual inferences in the light most favorable to Moore. From that perspective, we undertake a plenary inquiry into the questions

of whether the contours of the legal rights allegedly violated were clearly established at the time of the challenged actions and whether a material factual question exists as to the identified legal issues. Hutton v. Strickland, 919 F.2d 1531, 1536-37 (11th Cir. 1990). On the basis of that analysis, we disagree with the district court's conclusion and find that qualified immunity clearly attaches to Officer Meadow's challenged conduct.

I.

The record, viewed favorably to appellee Moore, evinces a confrontation between Moore and Meadows resulting in flared tempers. In August, 1988, Moore was in her eighth month of pregnancy. On August 5, she encountered a road barricade as she traveled to visit her husband at his place of work. Moore stopped at the barricade, rolled down her window, and gestured to Officer Meadows, who was standing

some distance away. Although Officer Meadows acknowledged her gesture with a wave, he did not immediately approach her car. Instead of waiting, Moore drove around the barricade--contemplating that the officer would pursue her if there was a problem. Moore Depo. at 13-14. He did. Meadows followed Moore in his patrol car with lights flashing and siren sounding until she stopped in a parking lot. She immediately ran from her car into a nearby building. She later emerged from the building--which proved to be her husband's place of work--accompanied by her husband, brother-in-law, and father-in-law. Officer Meadows, still standing in the parking lot, asked for her driver's license and advised her that he was going to write her a ticket for running the roadblock. Moore flatly refused to show Meadows her driver's license. She instead walked away from the officer, turned off the ignition on her car, retrieved her purse from the car, and

attempted once again to proceed past Officer Meadows and enter the building. Meadows announced that he was taking Moore to jail and attempted to restrain her. He "grabbed" her with both of his arms--taking her left arm in one hand and placing his right arm across her abdomen. Moore Depo. at 29. Moore pivoted loose from the officer and fled into the building.

At this point, Moore's husband interposed himself and advised Meadows that Moore was eight months pregnant. Mr. Moore then entered the building and attempted to persuade his wife to produce her license. Although Moore failed to locate her license, she eventually provided her name to the officer. After calling in Moore's name on his patrol car radio, Meadows learned that her license was suspended. Following these events, Officer Meadows charged Moore with failure to obey a traffic control device and driving on a suspended license, then permitted Moore's

husband to drive her to the Gwinnett County Jail where she was detained for three hours.

Two days later, Moore experienced unpleasant physical symptoms and noticed a sensation that the fetus she was carrying had become inactive. She visited her treating obstetrician the next day and was advised that the fetus' heart was beating and that she should continue her regular visits. Approximately a week after the incident, Moore was advised that the fetus was dead. Three days later, the fetus was stillborn.

The record contains only one expert medical opinion assessing these events--that of Moore's obstetrician, Dr. Khalad Goheer. Dr. Goheer rendered the following opinions: (1) that he saw at delivery no signs of maternal or fetal injury which would have caused the fetus' death; (2) there was no cause apparent to him for the fetus' death; and, (3) some cause other than an injury to

Moore caused the death. See Goheer Aff., R1-12 Ex. B. The record also contains the opinions of Moore and her husband to the effect that the child's appearance at birth led them to believe that he may have been injured. Moore Depo. at 35-36; James Moore Depo. at 37.

II.

1 On the basis of these events, Moore now claims that she was arrested in violation of her Fourth Amendment rights. Presumably, it is alleged that the assertedly unlawful arrest by Officer Meadows resulted in injuries to herself and her child. "An individual's right to be free from unlawful arrest and imprisonment implicates a liberty interest indisputably protected by the Constitution and federal laws, the violation of which may give rise to a cause of action under Section 1983." Motes v. Myers, 810 F.2d 1055, 1059 (11th Cir. 1987). As the district court noted, whether

such a cause lies in this case depends on the question whether Officer Meadows had probable cause to effect the arrest.

2 However, the question before us--and that which was before the district court--is not precisely whether probable cause existed in fact. When a law enforcement officer seeks summary judgment on the basis of qualified immunity, we only must ask whether, viewing the facts in a light favorable to the non-movant, there was arguable probable cause for the arrest. See Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir. 1990). This is equivalent to asking whether a "reasonable officer in the same circumstances and possessing the same knowledge as the Defendant could have believed that probable cause existed...." Id.[1]

---

1. Nevertheless, the issue of probable-cause-in-fact seems to be the focus of the district court's analysis. In light of

Due to factual disputes about the sequence of events, we assume in Moore's favor that Officer Meadows conducted the arrest based solely on Moore's failure to obey the road barricade and refusal to produce her driver's license. The question therefore, is whether arguable probable case existed to arrest an uncooperative individual who had committed a misdemeanor traffic offense in the officer's presence. The answer is readily provided by Georgia law, which provides that

---

certain factual disputes, the district court deemed itself unable to determine if probable cause existed and therefore concluded that there was potential merit to Moore's claim sufficient to preclude summary judgment. See R1-22-23-25; see also id. at 26 (equating question of probable-cause-in-fact relevant to Moore's state law claims with the question of arguable probable cause relevant to qualified immunity to section 1983 liability). In so doing, the court misapplied the relevant legal standard. We reaffirm that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . in such cases those officials . . . should not be held personally liable under section 1983 ." Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987).

probable cause can be grounded on a traffic misdemeanor. Under O.C.G.A. Section 17-4-20(a) (Michie 1990), Georgia law enforcement officers have the authority to make warrantless arrests for misdemeanors committed in their presence, including traffic misdemeanors. See United States v. Wilson, 853 F.2d 869, 872-74 (11th Cir. 1988), cert. denied, 488 U.S. 1041, 109 S.Ct. 866, 102 L.Ed.2d 990 (1989). Hence, arguable probable cause was triggered by Moore's bypassing the roadblock without permission.[2] Moreover, our finding of arguable probable cause is reinforced by undisputed facts as to Moore's

---

2. O.C.G.A. Section 40-6-26(b) (Michie 1991) provides:

> No person shall, without lawful authority, drive around or through or ignore any official traffic-control device so as to go onto an officially closed highway....

Violation of this statute is a misdemeanor. O.C.G.A. Section 40-6-1 (Michie 1991). See also O.C.G.A. Section 40-6-2 (Michie 1991) ("Obedience to authorized persons directing traffic.").

demeanor. By the time Officer Meadows restrained her, she had already fled from him once. See Moore Depo. at 26. According to her own account, she was flatly uncooperative when she returned to the parking lot, refusing to produce identification simply because she believed that the entire altercation was Officer Meadows' fault. See Moore Depo. at 28.[3]

We need not speculate whether an arrest was the most appropriate course under the circumstances of this case. Instead, we need only state what is virtually obvious from the facts: Officer Meadows had arguable probable cause to effect the arrest such that he is entitled to qualified immunity against Moore's unlawful arrest claim. Thus, the district court erred in failing to enter summary judgment on that basis.

---

3. Georgia imposes a statutory duty to provide a driver's license to a law enforcement officer demanding it. See O.C.G.A. Section 40-5-29(b) (Michie 1991).

III.

3 Whether Officer Meadows is entitled to qualified immunity against Mrs. Moore's excessive force claim depends on whether his actions were objectively unreasonable under the law which was clearly established at the time of the incident. Accordingly, his actions are to be evaluated with reference to four factors:

(1) the need for the application of force, (2) the relationship between the need and the amount of force used, (3) the extent of the injury inflicted and, (4) whether the force was applied in good faith or maliciously and sadistically.

Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir. 1986). In passing, we would note that the record lends weak support to Moore's claim with respect to the third and fourth factors. For summary judgment purposes, we credit, to the extent permissible, the Moores' allegation

that Mrs. Moore's stillborn child appeared to them to be injured; however, the record also compels our attention to the fact that the only expert medical opinion offered indicates that no injury to Moore or her unborn child--severe or otherwise--resulted from the incident. Moreover, the record contains no evidence to show malice on Officer Meadow's part other than his irate manner during the incident.

Regardless, the second factor, which essentially asks whether disproportionate force was used, is dispositive. This case involves none of the indices of excessive force recognized in our past cases. However, we are also aware that a police officer's use of force must be examined in light of the facts of each individual case. See Popham v.Kennesaw, 820 F.2d 1570, 1576 (11th Cir. 1987). Here, the facts indicate a need to initiate physical restraint as Moore was attempting to flee for a second time.

Moreover, the facts are clear that Meadows restrained Moore simply by putting his hands around her. Cf. Popham, 820 F.2d at 1577. We also note that the Officer did not apply any greater (and potentially disproportionate) force after Moore spun loose from his restraint. Officer Meadows did not strike Moore, throw her to the ground, pull her against him, or use or brandisn a weapon.

Under these circumstances, common sense dictates a finding that Officer Meadow's use of force was reasonable according to established standards. Even adopting Moore's version of the facts, there is no suggestion that Meadows went beyond firmly taking a hold of Moore and contacting her abdomen in the process. The act of physically holding back a misdemeanor suspect who is attempting to leave the scene, even given her pregnant condition, cannot sensibly be considered disproportionate as measured by this circuit's precedents.

Accordingly, we find no excessive force sufficient to indicate that Officer Meadows violated any clearly established constitutional right. The district court therefore erred in denying summary judgment on the basis of qualified immunity with respect to this claim.

IV.

4 Moore has asserted additional claims against Meadows under Georgia law for false arrest, false imprisonment, and malicious prosecution. See O.C.G.A. Section 51-7-1 (Michie 1982); id. Section 51-7-20; id. Section 51-7-40. However, the district court's denial of summary judgment with respect to these claims is an unappealable order that is not before this court as we review the district court's determination with respect to qualified immunity. Cf. Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985); Hutton v. Strickland, 919 F.2d 1531, 1535 (11th Cir.

1990). Accordingly, we remand the cause for proceedings on the remaining theories consistent with the factual analysis set forth herein. With respect to the claims under 42 U.S.C. Section 1983 against Officer Meadows, we reverse, finding that qualified immunity extends to the contested conduct in this case.

REVERSED and REMANDED for appropriate proceedings.

(2)

NO. 92-884

Supreme Court, U.S.
FILED
DEC 18 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1992

MONICA L. MOORE,

Petitioner,

vs.

GWINNETT COUNTY; J. O. MEADOWS; XYZ COMPANY; and JOHN DOE, jointly and severally,

Respondents.

BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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21 pp

Question Presented

Whether qualified immunity is available as a defense under 42 U.S.C. Section 1983 to claims that an officer has used excessive force in violation of the Fourth Amendment's prohibition against unreasonable seizures.

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IN THE

Supreme Court of the United States

October Term, 1992

MONICA L. MOORE,

Petitioner,

vs.

GWINNETT COUNTY; J. O. MEADOWS; XYZ COMPANY; and JOHN DOE, jointly and severally,

Respondents.

STATEMENT OF THE CASE

Respondents object to the recitation of the facts included in Petitioner's Statement of the Case as being incomplete and misleading and as including matters outside the record. Respondent submits for the Court's consideration the discussion of the facts contained in the Eleventh Circuit's opinion below:

> The record, viewed favorably to appellee Moore, evinces a confrontation between Moore and Meadows resulting in flared tempers.

In August, 1988, Moore was in her eighth month of pregnancy. On August 5, she encountered a road barricade as she travelled to visit her husband at his place of work. Moore stopped at the barricade, rolled down her window, and gestured to Officer Meadows, who was standing some distance away. Although Officer Meadows acknowledged her gesture with a wave, he did not immediately approach her car. Instead of waiting, Moore drove around the barricade - contemplating that the officer would pursue her if there was a problem. Moore Depo. at 13-14. He did. Meadows followed Moore in his patrol car with lights flashing and siren sounding until she stopped in a parking lot. She immediately ran from the car into a nearby building. She later emerged from the building - which proved to be her husband's place of work - accompanied by her husband, brother-in-law, and father-in-law. Officer Meadows, still standing in the parking lot, asked for her driver's license and advised her that he was going to write her a ticket for

running the roadblock. Moore flatly refused to show Meadows her driver's license. She instead walked away from the officer, turned off the ignition on her car, retrieved her purse from the car, and attempted once again to proceed past Officer Meadows and enter the building. Meadows announced that he was taking Moore to jail and attempted to restrain her. He "grabbed" her with both of his arms - taking her left arm in one hand and placing his right arm across her abdomen. Moore Depo. at 29. Moore pivoted loose from the officer and fled into the building.

> At this point, Moore's husband interposed himself and advised Meadows that Moore was eight months pregnant. Mr. Moore then entered the building and attempted to persuade his wife to produce her license. Although Moore failed to locate her license, she eventualy provided her name to the officer. After calling in Moore's name on his patrol car radio, Meadows

learned that her license was suspended. Following these events, Officer Meadows charged Moore with failure to obey a traffic control device and driving on a suspened license, then permitted Moore's husband to drive her to Gwinnett County Jail where she was detained for three hours.

> Two days later, Moore experienced unpleasant physical symptoms and noticed a sensation that the fetus she was carrying had become inactive. She visited her treating obstetrician the next day and was advised that the fetus' heart was beating and that she should continue her regular visits. Approximately a week after the incident, Moore was advised that the fetus was dead. Three days later, the fetus was stillborn.
>
> The record contains only one expert medical opinion assessing these events - that of Moore's obstetrician, Dr.

> Khalad Goheer. Dr. Goheer rendered the following opinions: (1) that he saw at delivery no signs of maternal or fetal injury which would have caused the fetus' death; (2) there was no cause apparent to him for the fetus' death; and, (3) some cause other than an injury to Moore caused the death. *See* Goheer Aff., R1-12 Ex. B. The record also contains the opinions of Moore and her husband to the effect that the child's appearance at birth led them to believe it may have been injured. Moore Depo. 35-36; James Moore Depo. at 37.

Moore v. Gwinnett County, 967 F.2d 1495, 1496-1497 (11th Cir. 1992).

SUMMARY OF ARGUMENTS

A. THIS CASE PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW

This case involves the evaluation of a

police officer's qualified immunity defense to an arrest-related excessive force claim. The court below, analyzed the objective reasonableness of Respondent Meadows' action in light of the law which was at the time of Petitioner's 1988 arrest clearly established in the Eleventh Circuit. Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989), had not yet been decided when Respondent Meadows arrested Petitioner. The Eleventh Circuit thus appropriately evaluated the qualified immunity defense with reference to the pre-Graham v. Conner four-part analysis which prevailed in the circuit in 1988.

B. **THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT**

Petitioner asserts that the decision of the court below is in direct conflict with Graham v. Conner, supra. However, the issue before this Court in Graham was materially different from the issue decided by the Eleventh Circuit in the

instant action. Graham involved a substantive analysis of an excessive force claim, while this case deals with qualified immunity. A qualified immunity defense necessitates an inquiry regarding the law which was clearly established at the time the claim accrued. Thus, the Eleventh Circuit properly applied the pre-Graham v. Conner standards prevailing in this circuit in analyzing Respondent Meadows' qualified immunity defense.

C. **THIS CASE PRESENTS NO CONFLICT IN THE CIRCUITS REQUIRING A DECISION OF THIS COURT**

Despite Petitioner's assertion to the contrary, there is no real conflict among the circuit courts regarding the availability of a qualified immunity defense to a Fourth Amendment excessive force claim. All but two of the circuits have expressly recognized the defense, and the two remaining circuits have simply not addressed the issue. Furthermore, even if there were a conflict, the undisputed facts in this

case would render this an inappropriate vehicle for addressing it: Under Graham v. Conner, Petitioner's claim on the merits fails as a matter of law.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

A. THIS CASE PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW

This Court has long recognized that law enforcement officers may be entitled to qualified immunity from suit in certain actions brought under 42 U.S.C. Section 1983. Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct., 18 L.Ed. 2d 288 (1967). Generally, a government official has qualified immunity from civil liability for claims arising from the performance of the official's discretionary functions if the official's conduct did not violate statutory or constitutional rights which were clearly established at the time. Harlow v. Fitzgerald,

457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982). In analyzing a qualified immunity defense, a court should be particularized and fact-specific in determining what law was reasonably established at the time the claim arose. Anderson v. Creighton, 483 U.S. 635, 638-640, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987). In the instant action, the Eleventh Circuit appropriately applied the foregoing principles in determining that Respondent Moore was entitled to qualified immunity from suit on Petitioner's excessive force claim.

Respondent Meadows arrested Petitioner on August 5, 1988, nearly a year before this Court rejected the substantive due process approach to determining whether a police officer had utilized excessive force during an arrest. Graham v. Conner, 490 U.S. 386, 109 S.Ct. 1865, 104 L. Ed. 2d 443 (1989). At the time of the 1988 incident, the Eleventh Circuit had clearly established a four-part test by which it determined whether excessive force had been used in the course of an

arrest. Leslie v. Ingram, 786 F. 2d 1533, 1536 (11th Cir. 1986). Accordingly, in the action now before this Court, the Eleventh Circuit framed the excessive force/qualified immunity issue as follows:

> Whether Officer Meadows is entitled to qualified immunity against Mrs. Moore's excessive force claim depends on whether his actions were objectively unreasonable under the law which was clearly established at the time of the incident.

Moore v. Gwinnett County, 967 F. 2d at 1498. Framimg the issue in such a fashion was completely consistent with this Court's decisions concerning qualified immunity. See, e.g., Frohmader v. Wayne, 958 F. 2d 1024, 1026-1027 (10th Cir. 1992). This case thus presents no substantial question concerning qualified immunity analysis for the Court's consideration.

B. **THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT**

Petitioner argues that the decision below conflicts with controlling precedent, specifically Graham v. Conner, supra. However, as this Court specifically noted, Graham did not involve a qualified immunity defense. Graham v. Conner at fn. 12. In Graham, this Court instead addressed the standards by which an arrest-related excessive force claim should be substantively evaluated. The distinction is important where, as here, the substantive law (such as the standard for determining whether an arrestee was subjected to constitutionally excessive force) changes between the time of the incident and the time that a defendant raises the qualified immunity defense in court.

Nothing in the Eleventh Circuit's opinion suggests that Petitioner's excessive force claim would have been judged by any standard other than

Graham v. Conner's Fourth Amendment objective reasonableness test had Respondent Meadows' qualified immunity defense failed. Accordingly, the decision of the court below does not conflict with decisions of this Court.

C. THIS CASE PRESENTS NO CONFLICTS AMONG THE CIRCUITS REQUIRING A DECISION OF THIS COURT

Petitioner asserts that there is a conflict among the circuits concerning the availability of qualified immunity as a defense to a Fourth Amendment excessive force claim. Respondents can discern no such conflict. While the analytical details differ somewhat from circuit to circuit, all circuits other than the First and Third Circuits have expressly recognized that an arresting officer may raise qualified immunity as a defense to an excessive force claim. See, e.g., Posr v. Doherty, 944 F.2d 91 (2d Cir. 1991); Mensh v. Dyer, 956 F.2d 36 (4th Cir. 1992); King v. Chide, 974 F.2d 653 (5th Cir. 1992); Yates v. City of Cleveland, 941 F.2d 444

(6th Cir. 1991); Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991); Fitzgerald v. Patrick, 927 F.2d 1037 (8th Cir. 1991); Vaco v. Baltad, 934 F.2d 214 (9th Cir. 1991); Frohmader v. Wayne, 958 F.2d 1024 (10th Cir. 1992); Hunter v. District of Columbia, 943 F.2d 69 (D.C. Cir. 1991). The First and Third Circuits appear not to have addressed the issue directly, but neither has indicated that the defense would be inapplicable to an arrest-related excessive force claim.

While it might be appropriate in a proper case for this Court to examine the details of the various circuits' approaches to qualified immunity in Fourth Amendment excessive force cases, the instant action does not provide a suitable vehicle for such an examination. The facts of the case now before this Court are such that any court in any circuit would be compelled to find Respondent Meadows is indeed entitled to qualified immunity. As the court below concluded,

> ...[T]he facts indicate a need to

initiate physical restraint as Moore was attempting to flee for a second time. Moreover, the facts are clear that Meadows restrained Moore simply by putting his hands around her....We also note that the officer did not apply any greater (and potentially disproportionate) force after Moore spun loose from his restraint. Officer Meadows did not strike Moore, throw her to the ground, pull her against him, or use or brandish a weapon.

> Under the circumstances, common sense dictates a finding that Officer Meadows's use of force was reasonable according to established standards.... Accordingly, we find no excessive force sufficient to indicate that Officer Meadows violated any clearly established constitutional right.

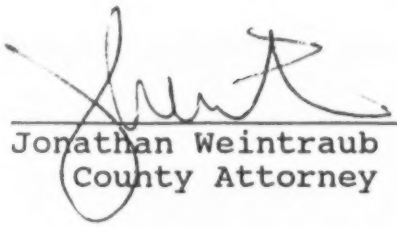
Moore v. Gwinnett County at 1499. Indeed, absent the qualified immunity defense, Respondent Meadows would be entitled to summary judgment on the underlying excessive force claim under the

Graham v. Conner objective reasonableness test. This case thus presents no conflict in the circuits for this Court to resolve.

CONCLUSION

Respondent respectfully request that the Petition for Certiorari be DENIED. The Eleventh Circuit Court of Appeals correctly analyzed and decided a straightforward issue - whether, under the undisputed facts of this particular case, Respondent Meadows was entitled to qualified immunity against Petitioner's excessive force claim. The court below properly examined the law which was clearly established at the time of Petitioner's arrest in finding that Respondent Meadows was indeed entitled to qualified immunity. There are no issues in this action rendering it appropriate for a grant of certiorari.

Respectfully submitted this 18th day of December, 1992.



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